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Supreme Court of the United States,

OCTOBER TERM, 1902.

NO. 263.

MUTUAL RESERVE FUND LIFE ASSOCIATION, . . . *Appellant*,

vs.

JAMES S. PHELPS AND FIDELITY TRUST AND SAFETY VAULT COMPANY, ... *Appellees*.

Supplemental Brief for Appellees.

BENJAMIN F. WASHER,
For Appellees.

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Supplemental Brief for Appellees.

(1.) This case has been heard and determined by the Circuit Court and Circuit Court of Appeals upon the two questions: (*a.*) Did the Jefferson Circuit Court in the proceedings, a complete record of which is filed with the bill in the U. S. Court, act within its jurisdiction? (*b.*) In any event, did the Circuit Court of the United States possess jurisdiction to enjoin the proceedings in the State Court?

These two questions are now before this Court. (See Assignments of Error, Rec., p. 74.) In addition, this Court is required to decide if anything complained of by appellant was or is repugnant to the 14th Amendment.

(2.) The issue of fact raised and litigated by the appellant itself in the State Court respecting the agency of B. Frese, is *res adjudicata* here. The decision of the Jefferson Circuit Court controls all other courts except those having direct appellate jurisdiction.

Moch *vs.* Insurance Co., 10 Fed. Rep. 707, and authorities therein cited.

Black on Judgments, sect. 273.

(3.) The Court of Appeals of Kentucky has construed section 631 of the Kentucky Statutes as authorizing a valid service of summons on the Insurance Commissioner under the facts of this case. Such construction will be adopted by this Court, as the appellant does not allege or argue that the construction given to the statute violates any provision of the Constitution.

"Unless the construction of the State Court make the Legislature to do an act which the Legislature cannot constitutionally do—if the Legislature might rightfully have done precisely what the interpretation of the State courts says it did do—can it be possible that there is any violation of the Constitution?"

Commercial Bank *vs.* Buckingham, 5 How. 326.

Murray *vs.* Gibson, 15 How. 423.

Guthrie on 14th Amendment, p. 44.

(4.) The receivership here was in the nature of an equitable garnishment resorted to solely for the purpose of executing a valid judgment then and now unsatisfied.

Opinion of U. S. Circuit Court.

Opinion of Circuit Court of Appeals.

"The process of garnishment after judgment is clearly a mode of execution. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which are in a third person's hands."

Dere *vs.* Strother, 10 Fed. Rep. 406.

Every court is left to decide for itself in what way and by what procedure its judgments and decrees are to be enforced; subject, of course, to review by its own appellate tribunals.

In Riggs *vs.* Johnson County, 6 Wall. 198, a mandamus was asked and granted in execution of a judgment, and this Court held it to be "neither a prerogative writ or a new suit in the jurisdictional sense. On the contrary, it is a proceeding ancillary to judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same."

Again, in Central Bank *vs.* Stephens, 169 U. S. 432:

"It has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment but continues until the judgment shall be satisfied. * * *

"An execution is the end of the law. It gives the successful party the fruits of his judgment. But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction."

(5.) Appellant states (brief, p. 41) that "the precise question of the right to appoint a receiver *in execution of a final judgment* without again bringing the judgment debtor into

court has never been before the Kentucky Court of Appeals."

Then, "in the absence of reported decisions by the Supreme Court of the State, this Court is justified in finding the law to be as declared in the case in hand."

Laing *vs.* Rigney, 160 U. S. 542.

But in Caldwell *vs.* Bank, 18 Ky. Law Rep. 156, and Rupert *vs.* Bank, 22 Ky. Law Rep. 684, the Kentucky Court of Appeals permitted an attachment in execution of a final judgment. The reply brief of appellant is in error in its intimation that those cases were controlled by section 436 or any provision of the Kentucky Code of Practice.

The quotations contained in appellant's brief are all from cases in which judgments were attempted to be set aside after they had become final. Quite different, we submit, from the case in hand, where the judgment was only sought to be executed.

The Kentucky cases cited by appellant, without exception, involved an attachment issued and prosecuted on a simple demand in an original, primary action and without summons or notice. Here, the "proceedings in the nature of attachment" were in a suit already instituted, in which the defendant had been summoned, and to enforce a judgment that it knew existed and was unpaid.

(6.) Income-earning contracts, the good will of a business, a franchise, and many other forms of incorporeal hereditaments are property capable of being taken into possession under process and by an officer of the court.

As, a seat in the Cotton Exchange:

Powell *vs.* Waldron, 89 N. Y. 328;

the mere right to rents and profits:

Stephen *vs.* Riebling, 45 Ill. App. 40;

a claim for damages based on fraud:

Rand, Receiver, *vs.* Wright, 141 Ind. 226.

The appellant association had at the time of the appointment of the Receiver by the Jefferson Circuit Court "largely more than one thousand certificates in force in Kentucky with an annual income from its business of at least fifty thousand dollars." (Bill of Complaint, Rec., p. 5; Affidavit, Rec., p. 29.)

There seems to us no "inaccuracy or inconsistency" in stating that the Receiver had taken possession of the assets, business, franchise, and contracts of the Association, but had not, at the date of the filing of appellant's bill, collected any money thereon.

(7.) The appellant has not been deprived of its property, the possession of the Receiver being that of the Jefferson Circuit Court.

"The utmost effect of the appointment is to put the property into his (the receiver's) custody as an officer of the court, for the benefit of the party ultimately proved to be entitled."

Union Bank *vs.* Kansas City Bank, 136 U. S. 234.

"The general proposition is that possession of the receiver is that of all the parties according to their titles." Lord Hargreave in *Re* Butler.

13 In. Ch. (N. S.) 456.

"The appointment of the receiver is not such as to oust any party of his right, that is, it is not adverse to either party to the action."

Beach on Receivers, sect. 236.

(8.) Further, on the right of courts of coequal, concurrent jurisdiction to impede and obstruct the proceedings of each other, see

Gumbel *vs.* Pitkin, 124 U. S. 156.

In the case cited this Court held that property in possession of a United States Marshal under an attachment, confessedly void, was nevertheless *in custodia legis* and not subject to the order, process, or seizure of a State court. This Court in that case sets forth the procedure which appellant here should have pursued.

Gumbel *vs.* Pitkin is erroneously cited by counsel for appellant. (Brief, p. 20, and Reply Brief, p. 3.)

In Evans *vs.* Gorman, 115 Fed. Rep. 403, a U. S. Circuit Court decided that under section 720 of the Revised Statutes and the comity between courts of concurrent jurisdiction, it had no power to enjoin proceedings in a State court notwithstanding the positive allegations of the bill that the State Court was without jurisdiction and acting fraudulently.

With the exception of the dicta of Hanford, D. J., in Northern Pacific *vs.* Kurtzman, 82 Fed. Rep. 243, the authorities cited by appellant do not appear to be in point.

In York *vs.* Texas, 137 U. S. 15, the injunction suggested by this Court was not one by a U. S. Court but an injunction

in the State Court. The sentence following the quotation in appellant's brief shows this.

Fitts *vs.* McGhee, 172 U. S. 516, was a proceeding against a state executive officer.

Arrowsmith *vs.* Gleason, 129 U. S.; Marshall *vs.* Holmes, 141 U. S., and Bank *vs.* Stephens, 169 U. S., where judgments of State courts were attacked for fraud, are not analogous. This, for the reason that such cases of necessity involve facts and proceedings not appearing on the face of the record and which must be alleged and proved, if at all, in a separate, independent action to be instituted in either State or Federal Court as conditions authorize.

The same criticism is made of French *vs.* Hay, 22 Wall., and Robb *vs.* Voss, 155 U. S., where the State Court judgment was assailed as having been procured on an unauthorized appearance of attorney.

A reading of the cases seems to develop the correctness of appellees' position.

"In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors or proceedings in another court; but it will scrutinize the conduct of the parties and if it finds that they have been guilty of fraud in obtaining judgment or decree, it will deprive them of the benefit of it or any inequitable advantage which they have derived under it.

"These principles control the present case which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded *upon a new state of facts, disclosing not only imposition upon a court of justice* in procuring from it authority to sell an infant's lands where there was no necessity therefor, but actual fraud in the exercise from time to time, of authority so obtained."

Arrowsmith *vs.* Gleason.

"The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class, there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

In distinguishing the case before the court and the case of Nougue *vs.* Clapp, the court said:

"For aught that appears that suit was brought simply to obtain a rehearing in the Circuit Court of the United States, setting up in equity issues that were and by proper diligence could have been fully determined in a suit at law in the State Court."

Marshall *vs.* Holmes.

Dietzch *vs.* Huidekoper, 103 U. S., was action by injunction taken in the Federal Court after a cause had been removed from the State Court. In this and similar cases, the U. S. Court does nothing more than protect its own exclusive jurisdiction. Quoting the decision:

"The bill in this case was, therefore, ancillary to the replevin suit, and was in substance a proceeding in the Federal Court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them.

"A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State Court."

In none of the cases referred to by appellant could the orderly method of appeal to the State Court of last resort and then by writ of error to this Court have availed. In the case before the Court proceeding by writ of error, admitting that the Kentucky Court of Appeals would have denied the appellant "due process of law," was entirely adequate.

(9.) The attempt to remove the ancillary proceeding to execute the judgment never progressed farther than the tender to the Jefferson Circuit Court of a petition and bond. The record has not to this day been filed in the U. S. Circuit Court.

If appellant's bill in the instant case was intended to protect the jurisdiction of the Federal Court, as the reply brief now seeks to argue, a complete and sufficient removal should have been alleged or that fact made to appear before this Court.

Respectfully, BENJAMIN F. WASHER.

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In the case of Youngstown Bridge Company v. White's Admr., 105 Ky. 282, the Kentucky Court of Appeals passed upon a motion to quash the return of a summons, and upon holding the service insufficient ordered the judgment set aside and the return quashed, without ordering a new trial or attempting to hold the defendant in court. Th case clearly shows that the Kentucky Court of Appeals does not apply the announcement contained in Chesapeake & Ohio R. R. Co. v. Heath's Admr., 87 Ky. 660, to motions such as the appellant made in the instant case.

Volume 105 of the Kentucky Reports is not in the Library of Congress, and for this reason the case to which reference is now made could not be cited in the reply brief filed by appellees, which was prepared and printed in Washington.

Appellees submit to the court, in addition to the criticism of appellant's position found on page 60 of appellees' original brief, that the appellant, under the decision in Youngstown Bridge Company v. White, *supra*, could have secured the fullest and fairest relief in the Kentucky Court of Appeals.

Respectfully,

BENJAMIN F. WASHER,

For Appellees.